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## COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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JOSE R. SANCHEZ,

Plaintiff and Appellant,

v.

ALIVIO MEDICAL GROUP, INC. et al.,

Defendants and Respondents.

C054716

(Super. Ct. No.  
05AS02185)

Plaintiff Jose Sanchez appeals from dismissal of his breach of contract and defamation action against his former employer Alivio Medical Group, Inc., and Mark Diaz after defendants' motion for judgment on the pleadings was granted. Sanchez contends a prior action involving severance pay has no collateral estoppel effect on the current action and he properly pleaded defamation. We affirm. The prior action has collateral estoppel effect on the issue of whether Sanchez was terminated for cause, and the defamation claim is barred by the privilege

of Civil Code section 47, subdivision (c) for communications concerning job performance.

#### FACTUAL AND PROCEDURAL BACKGROUND

Sanchez is a medical doctor; in 1999, he was disciplined by the Medical Board of California. He was placed on probation for five years due to accusations of alcohol and cocaine abuse. To continue practicing medicine he required a physician monitor. In 2000, Diaz agreed to serve as his monitor.

Sanchez signed an employment contract with Diaz. The agreement provided that if Sanchez was terminated without cause, he would receive 30 days' pay as liquidated damages. The agreement also provided that Sanchez would not solicit any patients of his employer for one year following termination of the contract. Diaz incorporated as Alivio Medical Group, Inc. (AMG).

In 2002, AMG terminated Sanchez's employment. AMG provided Sanchez with a letter stating two reasons for his dismissal: (1) indications that Sanchez was telling patients he was moving to a new practice or opening his own; and (2) failure to inform Diaz and AMG of his outside activities and provide documentation of his dispensation of prescription drugs outside the practice.

#### *Prior Action - Labor commissioner Claim*

Sanchez filed a claim with the labor commissioner, seeking severance pay, interest and additional wages as a penalty. The labor commissioner determined that Sanchez was terminated for cause and was not entitled to any additional pay.

Sanchez petitioned the superior court for review of this decision. He also moved to reclassify the case as one of unlimited jurisdiction. He wanted to challenge the enforceability of the liquidated damages clause in the employment contract and claimed he was defamed by the false reasons given for his termination.

AMG and Diaz opposed the motion to reclassify, and the court denied the motion. The court's ruling stated that if Sanchez "has a cause of action for defamation or other tort claims he should file a separate action."

The superior court ruled on Sanchez's petition to overturn the decision of the labor commissioner. The court lacked confidence in Sanchez's credibility. It found the record did not support the assertion that the termination was due to a dispute over Sanchez's pension. Of the reasons given for termination, the court found ordering drugs was the most serious. The court characterized it as "an elephant in the room[,]" noting that people went to jail for such conduct. The court did not accept Sanchez's story that he was accumulating Vicodin for a charitable mission one year later. Further, the conduct had to be assessed in the context of Sanchez's prior drug problems; it was a violation of the terms of his probation.

The court noted there were alternate theories on which to deny the petition. The court declined to articulate a basis for an alternate theory because it believed doing so would diminish what was happening. Sanchez ordered drugs improperly and that was a proper basis for termination; everything else was

secondary. The court found soliciting patients rated a two on a scale of one to ten, while ordering drugs improperly rated an eight or a nine. The court found "it is not a proper lawsuit." Recognizing the progress Sanchez had made and the successful completion of his probation, the court advised Sanchez to "just put this behind you."

Sanchez appealed the court's decision to the Appellate Division of the Superior Court. The appellate division affirmed the trial court's ruling on the matter before the labor commissioner.

*Instant Action for Breach of Contract and Defamation*

While review of the labor commissioner decision was underway, Sanchez filed a complaint against AMG and Diaz for breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, and unfair business practices. Shortly thereafter, he amended the complaint.

Defendants demurred to the first amended complaint. The court sustained the demurrer only as to the causes of action for defamation and unfair business practices. The court ruled that the statements were not slander per se and Sanchez failed to allege compelled republication under *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787.

Sanchez filed a second amended complaint, dropping the cause of action for unfair business practices and amending the defamation cause of action.

Defendants again filed a demurrer. They urged that the appeal of the labor commissioner decision would be entitled to

collateral estoppel effect so the complaint was subject to a plea of abatement until the appeal was final. They also claimed Sanchez failed to state a cause of action for defamation.

The court sustained the demurrer with leave to amend as to defamation. It noted that the decision upholding the labor commissioner's decision had been appealed; if that decision was upheld, "defendants may bring a motion for judgment on the pleadings."

#### *Third Amended Complaint*

Sanchez then filed a third amended complaint, the operative pleading for this appeal. The third amended complaint stated causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, alleging defendants terminated Sanchez without good cause.

The defamation cause of action alleged "Defendants wrongfully and intentionally asserted that they terminated Dr. Sanchez's employment for good cause. Specifically, Defendants asserted Dr. Sanchez had solicited patients away from Defendants and that he improperly ordered and/or distributed controlled substances without Defendants' knowledge or consent." The complaint alleged these statements were made to retaliate against Sanchez for raising a dispute about his pension plan. On information and belief, the complaint alleged Diaz said he had the power to "fuck over" Sanchez because Sanchez was on probation with the Medical Board. Diaz referred to Sanchez as being at his "mercy" and an "indentured servant" because Diaz

believed he had the power to destroy Sanchez's career by reporting him for improper ordering and distribution of drugs.

The complaint further alleged the statements "were heard at least by Dr. Sanchez." "These words were slanderous per se because they tend directly to injure him in respect to his office, profession, trade or business, . . . ." The assertion that Sanchez solicited patients caused injury by making him "less appealing than another suitably qualified physician who was not accused of improper solicitation of patients." The words were false.

The complaint alleged Sanchez was "repeatedly compelled to republish defendants' defamatory statements every time a potential employer seeks information about the termination[,]" as well as in depositions for patients' worker's compensation claims. The compelled republication was foreseeable because Sanchez had to be monitored by another physician and thus would have to explain the reason for his termination. Two potential employers had compelled Sanchez "to republish the false reasons for his termination from AMG."

The complaint sought damages, punitive damages, interest, attorney fees and costs.

Defendants again demurred, renewing the plea in abatement and challenging the sufficiency of the pleadings for defamation.

The court ordered the action stayed pending the decision of the appellate division on review of the labor commissioner's decision.

*Defendants' Motion for Judgment on the Pleadings*

After the appellate division affirmed the trial court decision on the claim before the labor commissioner, defendants filed a motion for judgment on the pleadings in the breach of contract and defamation action. Defendants asserted the primary issue in the case was whether they terminated Sanchez for cause and that issue had been decided in their favor in the review of the labor commissioner's decision. The first and second causes of action, contract claims, therefore had to fall. Defendants argued Sanchez failed to state a cause of action for defamation. Sanchez alleged direct publication only to himself; the words were not slanderous per se; foreseeable republication was inadequately pled; the statements were privileged under Civil Code section 47, subdivision (c); and Sanchez failed to allege actual malice.

The trial court granted the motion. It found collateral estoppel barred the contract claims. Collateral estoppel also barred defamation because implicit in the finding that Sanchez was terminated for cause was that the reasons for his termination were true. In addition, defendants' statements were privileged under Civil Code section 47, subdivision (c). Judgment was entered in favor of defendants.

Defendants were awarded \$17,320 in attorney fees under the attorney fee provision in the employment contract.

Sanchez appealed from both the judgment and the attorney fee order.

## DISCUSSION

### I. *Standard of Review*

"A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. [Citation.] A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.] All properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law; judicially noticeable matters may be considered. [Citations.]" (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

## II. *Timeliness of Motion*

Sanchez contends defendants' motion for judgment on the pleadings was actually a motion for reconsideration of their earlier demurrer and thus was untimely since it was filed more than 10 days after the ruling on the demurrer. (Code Civ. Proc., § 1008, subd. (a).) Sanchez asserts defendants twice demurred on the basis of collateral estoppel and the trial court overruled the demurrers on this ground.<sup>1</sup>

Sanchez misstates the record. In ruling on the demurrer to the second amended complaint, the court noted the trial court decision on the Labor commissioner's ruling had been appealed, so the issue had not been finally determined as necessary for collateral estoppel. "If Judge Connelly's decision is upheld, defendants may bring a motion for judgment on the pleadings."

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<sup>1</sup> Sanchez cites to the demurrer to the first and second amended complaints. The demurrer to the first amended complaint did not raise collateral estoppel, only the demurrers to the second and third amended complaints did.



In ruling on the demurrer to the third amended complaint, the court again noted the decision was on appeal. The court sustained the demurrer on the ground of another action pending and stayed the proceeding. The court noted the final decision in the dispute before the labor commissioner could affect both the contract claims and the defamation claim. "Whether collateral estoppel or res judicata will bar plaintiff's claims will not be known until the appeal is decided."

The first time defendants raised collateral estoppel after there was a final judgment was in the motion for judgment on the pleadings. Whether collateral estoppel applied could not be determined earlier; it was properly raised in the motion for judgment on the pleadings. Defendants' motion was not a motion for reconsideration.

The motion for judgment on the pleadings was timely. A defendant may file a motion for judgment on the pleadings after defendant has already filed an answer and the time to demur to the complaint has expired. (Code Civ. Proc., § 438, subd. (f)(2).) Defendants had filed their answer. More than 30 days had elapsed after service of the third amended complaint, so the time to demur had expired. (Code Civ. Proc., § 430.40, subd. (a).)

### III. *Collateral Estoppel*

Sanchez contends the trial court erred in finding collateral estoppel barred this action. First, he contends the judgment resolving his claim before the labor commissioner (the prior action) has no collateral estoppel effect in the instant

action because this action involves a different issue. He asserts that he now seeks determination of whether defendants defamed him and breached the employment contract by falsely accusing him of soliciting patients, and this issue was not determined in the prior action.

"Collateral estoppel is one aspect of the broader doctrine of res judicata. [Citation.] 'Where res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates (in the second of two actions which do not involve identical causes of action) to obviate the need to relitigate issues already adjudicated in the first action. [Citation.] The purposes of the doctrine are said to be "to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation." [Citation.]'" (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878.)

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is

sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements. [Citation.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.)

The issue determined in the prior action was whether Sanchez was terminated for cause; he was entitled to severance pay under the employment contract only if the termination was without cause. Defendants offered two reasons for the termination: soliciting patients and mishandling prescription drugs. In ruling on the petition for review of the labor commissioner's decision, the trial court decided to base its decision on the claim Sanchez mishandled drugs because that was the more serious charge. While the court noted there were alternative theories on which to deny the petition, it expressly declined to articulate a basis for an alternative theory, preferring to focus exclusively on the more serious charge of mishandling drugs.

Defendants argue the trial court determined both reasons given supported Sanchez's termination. They cite the court's lack of confidence in Sanchez's credibility and its reference to alternative theories. While these aspects of the record suggest that, if called to so decide, the court would have found Sanchez solicited patients, such a decision was unnecessary in light of the court's finding that Sanchez mishandled drugs and that was sufficient to support a termination for cause. Collateral estoppel "bars only issues that were actually and necessarily

decided in the earlier litigation." (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 11, fn. omitted.) The trial court in the prior action made clear its decision rested on the charge of mishandling drugs so only that reason for termination was actually and necessarily decided.

The prior action resolved that Sanchez was terminated for cause. Both the causes of action for breach of contract and breach of the covenant of good faith and fair dealing were premised on the assertion that Sanchez was not terminated for cause. Thus, both these causes of action are barred by collateral estoppel.

The prior action also determined that Sanchez mishandled prescription drugs. Since this allegation was the more damaging of the two allegedly defamatory statements, this determination against Sanchez significantly weakened his defamation claim; it defeated his general allegation that defendants falsely asserted they terminated him for cause. Sanchez also alleged, however, that defendants' statement that he solicited patients was defamatory and damaged his reputation. Accordingly, the defamation cause of action is not entirely barred by collateral estoppel.

Sanchez offers additional reasons why collateral estoppel does not apply in this case. He contends defendants waived the collateral estoppel defense by opposing reclassification of the wage dispute and admitting the issues in the instant action were different from those in the prior action. He asserts collateral estoppel cannot apply because the trial court lacked authority

in the prior action to determine any issues beyond the severance pay dispute and the court specifically granted him the right to file the instant action.

In this argument, Sanchez confuses collateral estoppel with res judicata. "Res judicata prohibits the relitigation of claims and issues which have already been adjudicated in an earlier proceeding. The doctrine has two components. '"In its primary aspect the doctrine of res judicata [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action." . . . The secondary aspect is "collateral estoppel" or "issue preclusion," which does not bar a second action but "precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding."' [Citations.]" (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335.)

The prior action conclusively determined that Sanchez was terminated for cause due to his mishandling of prescription drugs. Collateral estoppel barred relitigating this factual issue, but Sanchez was free to raise other claims in a new lawsuit. Indeed, the trial court so stated in denying the motion to reclassify. Only if those new claims relied on a finding that he was not terminated for cause and did not mishandle drugs were they also barred by collateral estoppel. His contract claims were based on the assertion he was terminated without cause, so they are barred by collateral estoppel. His defamation claim was based in part on defendants'

statements that Sanchez solicited patients, so it is not barred. We turn now to whether Sanchez properly pled a cause of action for defamation.

#### IV. *Defamation*

Sanchez contends he adequately pled a cause of action for defamation; any deficiencies in earlier complaints were cured by the allegations in the third amended complaint. He contends the trial court erred in finding the conditional privilege of Civil Code section 47, subdivision (c) applied.

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage. [Citations.] Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient. [Citations.]" (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645, fn. omitted.)

"One of the elements of the tort of defamation is 'publication.'" (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.) The third amended complaint alleges: "The words were heard at least by Dr. Sanchez." This allegation is insufficient to establish publication. "It is axiomatic that for defamatory matter to be actionable, it must be communicated, or 'published,' intentionally or negligently, to 'one other than

the person defamed.' [Citation.]" (*Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 112.)

To establish publication, Sanchez relied on the doctrine of compelled republication, as set forth in *McKinney v. County of Santa Clara, supra*, 110 Cal.App.3d 787. In *McKinney*, a former deputy sheriff brought a defamation action against his former employer. The defamatory statements were made in reviewing his job performance and formed the basis for his dismissal. Plaintiff conceded he made the republications, but claimed they were not voluntary but required as a practical matter as part of applying for a new job. (*Id.* at pp. 792-793.) The trial court dismissed the action because plaintiff himself had republished the defamatory statements. (*Id.* at p. 798.)

The appellate court reversed, finding a triable issue of fact on the issue of publication. (*McKinney v. County of Santa Clara, supra*, 110 Cal.App.3d 787, 798.) The court adopted a theory of compelled republication that applied in two contexts. First, where the originator had reason to believe a letter sent to the defamed containing libel will fall into the hands of a third party before the defamed reads it. (*Id.* at p. 796.) The second context "is where the originator of the defamatory statement has reason to believe the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person *after* he has read it or been informed of its contents. [Citations.]" (*Ibid.*) "The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal

link between the actions of the originator and the damage caused by the republication. This causal link is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed." (*Id.* at pp. 797-798.) The rule of *McKinney* "has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1285.)

Sanchez's third amended complaint alleged he was "repeatedly compelled to republish Defendants' defamatory statements every time a potential employer seeks information about the termination of his employment relationship with Defendants[.]" The complaint then specified two potential employers who asked why Sanchez's employment with AMG was terminated. The complaint explained that due to his probation status, Sanchez required a physician monitor to practice medicine; he could not open his own private practice. He was required to seek employment with another physician and explain his termination by AMG. These allegations were sufficient to allege compelled republication under *McKinney, supra*, 110 Cal.App.3d 787.

In addition to collateral estoppel, the trial court sustained defendants' demurrer to the defamation cause of action based on the privilege of Civil Code section 47, subdivision



(c). "The general rule is that a privilege must be pleaded as an affirmative defense. [Citation.] But where the existence of a privilege is revealed on the face of the complaint, it may be asserted in a demurrer." (*Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 538.)

Civil Code section 47, subdivision (c) provides a conditional privilege for communications between parties with a common interest. It provides: "In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law." (Civ. Code, § 47, subd. (c).)

"Courts have consistently interpreted section 47, subdivision (c) to apply in the employment context. [Citations.]" (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1369.) "In 1994 the Legislature amended section 47, subdivision (c) to expressly state the common-interest privilege applies to communications made by current or former employers to prospective employers. [Citations.]" (*Ibid.*) The bill to amend the statute was sponsored by the Los Angeles Unified School District Personnel Commission, which stressed the need for candid responses of former employers about those seeking teaching positions. Although the common interest privilege would already apply, the Legislature sought the "'certainty of statute'" to protect employers giving job references. (*Id.* at pp. 1369-1370.)

Sanchez contends the privilege is not applicable because the complaint alleged malice. The conditional common-interest privilege applies only where the communication is made "without malice." (Civ. Code, § 47, subd. (c).) Ill will toward plaintiff is insufficient to establish malice; there must a link between defendant's hostility to plaintiff and his awareness of the probable falsity of the statement. (*Live Oak Publishing Co. v. Cohagan, supra*, 234 Cal.App.3d at pp. 1291-1292.) "[W]here a defendant's immunity or privilege is apparent from the face of the complaint, the plaintiff's allegations of actual malice to overcome the privilege must be supported by specific facts from which the trier of facts could reasonably conclude that the

defendant acted for an improper motive unrelated to the privilege." (*Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 885.)

The complaint alleged the basis of defendants' malice was retaliation. "Defendants wrongfully and intentionally made these statements to retaliate against Dr. Sanchez for raising and sustaining a dispute about his pension plan." The complaint further alleged Diaz made certain statements about his power to "fuck over" Sanchez who at his "mercy" and an "indentured servant" as part of a plan to cause injury to Sanchez in retaliation for the pension dispute. The issue of retaliation, however, was resolved against Sanchez in the prior action. There, the trial court expressly found that Sanchez's termination was not due to the pension dispute. Sanchez cannot relitigate the issue of retaliation; collateral estoppel bars him from asserting retaliation. Sanchez failed to allege any other specific facts to support actual malice.

Sanchez next contends the conditional privilege does not apply because it requires a communication by a current or former employer to prospective employers. (Civ. Code, § 47, subd. (c).) Defendants did not make the statements to prospective employers, only Sanchez did. Under Sanchez's theory of compelled republication, he was compelled to republish the statements to prospective employers. In effect, he was the foreseeable conduit through which defendants' allegedly defamatory statements were made to prospective employers. Sanchez cannot defeat the privilege by volunteering the statements rather than requiring prospective employers to obtain

the information directly from defendants, which communication would clearly be privileged under Civil Code section 47, subdivision (b). (*Noel v. River Hills Wilsons, Inc., supra*, 113 Cal.App.4th 1363, 1369; see also *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846 [In defamation action, statements by defendant relating to plaintiff's forced retirement were privileged under Civil Code section 47(c) where made in an effort to preserve employee morale and efficiency].)

Sanchez contends applying the privilege "would effectively moot the clear and conspicuous holding of *McKinney v. County of Santa Clara*, 110 Cal.App.3d 787 (1980)." We recognize that the alleged defamation in *McKinney* was, as here, statements about the reason for terminating an employee. While some of the cases upon which *McKinney* relied arose in similar contexts, not all of them did. (See *McKinney v. County of Santa Clara, supra*, 110 Cal.App.3d at p. 796.) The rule of compelled republication is not limited to the employment context. The issue of the applicability of the privilege of Civil Code section 47, subdivision (c) was not raised in *McKinney*. "'It is axiomatic that cases are not authority for propositions not considered.'" (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) We also note the amendment to subdivision (c) of Civil Code section 47, making explicit that the common interest privilege applies in the employment context, occurred in 1994 (Stats. 1994, ch. 364, § 1, p. 2169 (Assem. Bill No. 2778)), 14 years after the *McKinney v. County of Santa Clara* decision.

The conditional common interest privilege of Civil Code section 47, subdivision (c) applied. The trial court did not err in granting defendants' motion for judgment on the pleadings.

V. *Attorney Fees*

Sanchez contends the trial court erred in granting defendants' motion for attorney fees. The sole basis of this contention is that the motion for judgment on the pleadings should not have been granted. Since we find no error in granting that motion, we find no error in granting the motion for attorney fees.

DISPOSITION

The judgment is affirmed.

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MORRISON, J.

We concur:

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SCOTLAND, P. J.

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ROBIE, J.